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2 **NOT FOR PUBLICATION**

4 **UNITED STATES BANKRUPTCY COURT**

5 **EASTERN DISTRICT OF CALIFORNIA**

7 In re:

Case No. 20-23457-A-7

8 ERNESTO PATACSIL and MARILYN EMBRY
9 PATACSIL,

10 Debtors.

11 JOSEPH CABARDO et al.,

12 Adv. No. 20-02167-A

13 Plaintiffs,

14 FEC-1

15 v.

16 ERNESTO PATACSIL et al.,

17 Defendants.

20 **Memorandum Regarding Preclusive Effect, ECF Nos. 106, 117**

1 This case is about square pegs and round holes. Acting as
2 private attorneys general, eight former employees sued their employer
3 for wage and hours violations; they obtained judgment for unpaid
4 wages, penalties, and attorneys' fees. After the defendants filed
5 bankruptcy, the injured employees filed this adversary proceeding to
6 except their judgment from discharge. 11 U.S.C. § 523(a)(6) (willful
7 and malicious injuries), (a)(7) (penalties due the government). Have
8 the plaintiffs pounded their judgment into § 523?

9 **I. FACTS**

10 Ernesto Patacsil and Marilyn Embry Patacsil ("Patacsils") did
11 business as Patacsils' Care Homes. Patacsils' Care Homes operated
12 seven residential care facilities for mildly impaired developmentally
13 disabled persons. To assist them, the Patacsils employed the
14 plaintiffs and others to act as caregivers for their residents. The
15 Patacsils did not pay their employees in an amount or manner
16 consistent with California's wage and hours laws.

17 Aggrieved by the Patacsils' treatment and after giving notice to
18 the California Labor and Workforce Development Agency, eight employees
19 and/or former employees ("the Cabardo plaintiffs") sued the Patacsils
20 in District Court acting under the Private Attorney General Act, Cal.
21 Labor Code § 2698 et seq. (hereinafter also referred to as "PAGA"), to
22 collect damages for wages and hours violations. They also sought
23 Labor Code penalties for the Patascils' violations of the labor laws.
24 The employees were represented by the law firm of Mallison & Martinez
25 and by John R. Grele ("Grele"). After trial, the District Court
26 awarded the Cabardo plaintiffs damages of \$893,815, penalties of
27 \$79,524 and attorneys' fees of \$1,077,218. Compl. ¶ 8, ECF No. 1.

28 Sometime later, the Patacsils ceased doing business. *Id.* at ¶

1 33.

2 Predictably, the Patacsils filed a Chapter 7 bankruptcy.

3 In response, the eight employees, Mallison & Martinez, and Grele
4 filed an adversary proceeding to protect their judgment from
5 discharge. They advanced two theories for excepting their debt.
6 First, the Cabardo plaintiffs seek to perfect their rights in the
7 judgment, which they contend arose from a willful and malicious
8 injury. 11 U.S.C. § 523(a)(6), (c)(1). Second, the Cabardo
9 plaintiffs and their counsel seek to determine the dischargeability of
10 the civil penalties, i.e., \$79,524, as a debt "payable and for the
11 benefit of a governmental unit." 11 U.S.C. § 523(a)(7); Fed. R. Bankr.
12 P. 4007(a). Leveraging their second theory, they suggest that the
13 \$1,077,218 in attorneys' fees awarded for recovering those civil
14 penalties is also nondischargeable.¹ The defendants Patacsil filed an
15 answer to the complaint and the matter is ready for trial.

16 **II. PROCEDURE**

17 By motions in limine, the plaintiffs move to give preclusive
18 effect to the District Court's findings and to bar defendants from
19 presenting evidence to the contrary. Mot. in Limine 3:10-16, ECF No.
20 106; Mot. to Give Preclusive Effect, ECF No. 117. The motions in
21 limine are unsupported by evidence but refer to the judgment, eight
22 special verdict forms, and the findings of fact. Mot. in Limine 2:3-
23 7, ECF No. 117; Mot. in Limine 3:2-10, ECF No. 106 ("The findings from
24 the jury and the District Court should be given preclusive
25 effect..."). Trial of this adversary proceeding has not yet commenced

26
27 ¹ In some cases, attorneys' fees awarded as damages for a debt not
28 dischargeable under 11 U.S.C. § 523(a) are also nondischargeable. *Cohen v.*
de la Cruz, 523 U.S. 213, 218 (1998); *In re Zito*, 604 B.R. 388, 392-393 (9th
Cir. BAP 2019).

1 and evidence has been lodged, but not yet admitted into evidence.
2 The court has taken limited judicial notice of the findings made in
3 the District Court action, Mem., ECF No. 178. The court took judicial
4 notice of the following facts:

- 5 1. the existence of a judgment in favor of plaintiffs and
6 against defendants, as well as its contents, in
7 *Cabardo v. Patacsil*, No. 2:212-cv-01705 (E.D. Cal.
2012), Ex. B;²
- 8 2. the existence of an order awarding plaintiffs'
9 attorneys' fees against *Cabardo v. Patacsil*, No.
2:212-cv-01705 (E.D. Cal. 2012), in the amount of
\$1,077,218.62, Ex. C;
- 10 3. the existence of eight verdict forms in *Cabardo v.*
11 *Patacsil*, No. 2:12-cv-01705 (E.D. Cal. 2012), Ex. K-R,
12 as well as the ancillary facts that: (A) plaintiffs
13 and defendants previously litigated to conclusion the
question of defendants' violation of wage and overtime
laws; and (B) plaintiffs prevailed in that action; and
- 14 4. the existence of Findings of Fact and Conclusions of
15 Law in *Cabardo v. Patacsil*, No. 2:212-cv-01705
(E.D. Cal. 2012).

16 Order, ECF No. 177.

17 All other requests for judicial notice were denied. *Id.*

18 The defendants Patacsil have filed opposition to these motions.

19 Opp'n., ECF No. 139.

20 III. JURISDICTION

21 This court has jurisdiction. 28 U.S.C. §§ 1334(a)-(b), 157(b);
22 see also General Order No. 182 of the Eastern District of California.
23 Jurisdiction is core. 28 U.S.C. § 157(b)(2)(I); *Carpenters Pension*
24 *Trust Fund for Northern Calif. v. Moxley*, 734 F.3d 864, 868 (9th
25 Cir. 2013); *In re Kennedy*, 108 F.3d 1015, 1017 (9th Cir. 1997). Plaintiffs
26 do not consent to the entry of final orders and judgments by this

27 ² The exhibits refer to trial exhibits which have been lodged with the court
28 and to which no objection has been made notwithstanding the pretrial order
requiring parties to do so. Am. Pretrial Order §§ 1.0, 8.0, ECF No. 95.

1 court; defendants do so consent. 28 U.S.C. § 157(b)(3); *Wellness*
2 *Int'l Network, Ltd. v. Sharif*, 135 S.Ct. 1932, 1945-46 (2015).
3 Scheduling Order § 2.0, ECF No. 13.

4 **IV. LAW**

5 **A. Motions in Limine**

6 A motion in limine is a request for guidance on an evidentiary
7 issue. *Hays v. Clark County*, 2008 WL 2372295 * 7 (Nev. 2008). Among
8 the issues that may be raised is res judicata. *Id.*; *Hamilton v.*
9 *Wilmmes*, 2016 WL 1436407 (E.D. Cal. 2016).

10 As one court summarized the law applicable to motions in limine:

11 A motion in limine is a request for the court's guidance
12 concerning an evidentiary question. Judges have broad
13 discretion when ruling on motions in limine. However, a
14 motion in limine should not be used to resolve factual
15 disputes or weigh evidence. To exclude evidence on a motion
in limine the evidence must be inadmissible on all
potential grounds. Unless evidence meets this high
standard, evidentiary rulings should be deferred until
trial so that questions of foundation, relevancy and
potential prejudice may be resolved in proper context.
16

17 *Hays*, 2008 WL 2372295 at 7. (internal citations and quotation marks
omitted).

19 **B. Issue Preclusion**

20 Issue preclusion applies to actions to except a debt from
21 discharge under 11 U.S.C. § 523. *In re Comer*, 723 F.2d 737, 740 (9th
22 Cir. 1984). Whether issue preclusion is available is a question of
23 law. *United States v. Geophysical Corp. of Alaska*, 732 F.2d 693, 697
24 (9th Cir. 1984). Because the underlying judgment was rendered in
25 federal court, federal common law provides the contours of issue
26 preclusion. *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008). The party
27 asserting its applicability has the burden of proving each of its
28 elements. *Id.* at 907; *Garity v. APWU Nat'l Labor Org.*, 828 F.3d 848,

1 855 (9th Cir. 2016). "Reasonable doubts about what was decided in a
2 prior judgment are resolved against applying issue preclusion." *In re
3 Frye*, No. ADV.LA 07-01150-BB, 2008 WL 8444822, at *4 (B.A.P. 9th Cir.
4 Aug. 19, 2008), citing *Lopez v. Emergency Serv. Restoration, Inc.* (*In
5 re Lopez*), 367 B.R. 99, 107-08 (9th Cir. BAP 2007).

6 The elements of federal issue preclusion are well-known:

- 7 (1) the issue at stake was identical in both proceedings;
8 (2) the issue was actually litigated and decided in the
9 prior proceedings; (3) there was a full and fair
opportunity to litigate the issue; and (4) the issue was
necessary to decide the merits.

10 *Janjua v. Neufeld*, 933 F.3d 1061, 1065 (9th Cir. 2019), citing
11 *Oyeniran v. Holder*, 672 F.3d 800, 806 (9th Cir. 2012), as amended (May
12 3, 2012); see also *Howard v. City of Coos Bay*, 871 F.3d 1032, 1041
13 (9th Cir. 2017).

14 The first element, identity of issues, is also well-known:

15 Typically, we apply four factors (known as the Restatement
16 factors) to evaluate the question:

17 (1) is there a substantial overlap between the evidence or
argument to be advanced in the second proceeding and that
advanced in the first?

18 (2) does the new evidence or argument involve the
application of the same rule of law as that involved in the
prior proceeding?

19 (3) could pretrial preparation and discovery related to the
matter presented in the first action reasonably be expected
20 to have embraced the matter sought to be presented in the
second?

21 (4) how closely related are the claims involved in the two
proceedings?

22 *Resolution Tr. Corp. v. Keating*, 186 F.3d 1110, 1116 (9th Cir. 1999)
23 quoting *Kamilche Co. v. United States*, 53 F.3d 1059, 1062 (9th Cir.
24 1995)); see also *Restatement (Second) of Judgments* § 27 cmt. c (Am.
25 Law Inst. 1982).

1 The second element, actually litigated, is also supported by
2 ample case law. “[A]n issue is actually litigated when an issue is
3 raised, contested, and submitted for determination.” *Janjua v.*
4 *Neufeld*, 933 F.3d 1061, 1066 (9th Cir. 2019), citing Restatement
5 (Second) of Judgments § 27, cmt. (d) (1982) (“When an issue is
6 properly raised, by the pleadings or otherwise, and is submitted for
7 determination and is determined, the issue is actually litigated
8”).

9 The third element, a full and fair opportunity, calls for
10 pragmatics.

11 In determining whether a party had a “full and fair
12 opportunity to litigate,” courts in the Ninth Circuit are
13 instructed to make a “practical judgment” based on at least
14 two considerations. First, if the procedures used in the
15 first and second actions vary enough to raise the potential
16 for a different result, issue preclusion is inappropriate.
Second, if the party’s motivation differed in the two
actions, whereby an issue in the first action did not need
to be contested as significant, issue preclusion should not
prevent the litigation of that issue in a subsequent
action.

17 *In re Yu*, 545 B.R. 633, 639 (Bankr. C.D. Cal. 2016), aff’d sub nom. *In*
18 *re Chunchai Yu*, No. 6:15-AP-01153-SC, 2016 WL 4261655 (B.A.P. 9th Cir.
19 Aug. 11, 2016), aff’d, 694 F. App’x 542 (9th Cir. 2017) (internal
20 citation omitted).

21 Finally, the issue must be necessary to an on-the-merits
22 decision. “[N]ecessarily’... means only that the court undeniably
23 decided the issue, not that it was unavoidable for it to do so.”
24 *MedImpact Healthcare Sys., Inc. v. IQVIA Holdings Inc.*, No. 19CV1865-
25 GPC(DEB), 2022 WL 2292982, at *4 (S.D. Cal. June 24, 2022), citing
26 *United States v. Johnson*, 256 F.3d 895, 915 (9th Cir. 2001).

27 Even where issue preclusion is available, the trial court retains
28 discretion with respect to whether it should be applied. *United*

1 *States v. Geophysical Corp. of Alaska*, 732 F.2d 693, 697 (9th Cir.
2 1984); *Baldwin v. Kilpatrick (In re Baldwin)*, 249 F.3d 912, 919-920
3 (9th Cir. 2001); Rest. (Second) Judgments § 28(2).

4 **V. DISCUSSION**

5 **A. Debt**

6 “The existence of an enforceable debt is the sine qua non to an
7 action to except debt from discharge, 11 U.S.C. § 523(a). 11 U.S.C. §
8 523(a) (“A discharge ... does discharge an individual from any debt”);
9 11 U.S.C. § 101(5)(claim), (12)(debt); *In re Dobos*, 303 B.R. 31, 39
10 (9th Cir. BAP 2019). [State law determines whether a “debt,” 11 U.S.C.
11 § 523(a), exists. *Northbay Wellness Group, Inc. v. Beyries*, 789 F.3d
12 956, 959 n. 3 (9th Cir. 2015).” *In re Schmidt*, No. 20-25614-A-7, 2023
13 WL 488988, at *1 (Bankr. E.D. Cal. Jan. 24, 2023).

14 Issue preclusion applies to the judgment rendered in the District
15 Court action and bars the defendants from re-litigating the existence,
16 as well as the amount, of the debt owed by the defendants to the
17 plaintiffs. The issue at stake was identical, i.e., violation of
18 California Labor Law. The dispute was tried by jury, who gave a
19 special verdict. The District Court reduced those to findings of fact
20 and entered judgment. At oral argument, the defendants conceded the
21 applicability of collateral estoppel to the debt. Order, ECF No. 177;
22 11 U.S.C. § 101(5), (10), (12). For these reasons, issue preclusion
23 applies and establishes the existence, as well as the amount, of debt
24 owed by the defendants to the plaintiff employees and their counsel.

25 **B. Section 523(a)(6)**

26 Section 523(a)(6) excepts from discharge debt for “willful and
27 malicious injury.” 11 U.S.C. § 523(a)(6). Willful has a particular
28 meaning:

1 "Willful injury": "Willful" within the meaning of §
2 523(a)(6) means "deliberate or intentional." [*Kawaauhau v.*
3 *Geiger* (1998) 523 US 57, 61, 118 S.Ct. 974, 977, fn. 3].

4 The "willful injury" requirement is met when the creditor
5 shows that: [1] the debtor had a subjective motive to
6 inflict the injury; or [2] the debtor believed the injury
7 was substantially certain to occur as a result of his or
8 her conduct. [*In re Hamilton* (9th Cir. BAP 2018) 584 BR
9 310, 319, citing *In re Jercich* (9th Cir. 2001) 238 F3d
10 1202, 1208; see also *In re Su*, *supra*, 290 F3d at 1144].

11 Subjective standard: Section 523(a)(6) nondischargeability
12 is limited "to those situations in which the debtor
13 possesses subjective intent to cause harm or knowledge that
14 harm is substantially certain to result from his actions."
15 [*In re Su*, *supra*, 290 F3d at 1145, fn. 3 (emphasis added);
16 *In re Black* (9th Cir. BAP 2013) 487 BR 202, 211].

17 March, Ahart & Shapiro, *California Practice Guide: Bankruptcy* § 22:670
18 (Rutter Group December 2022).

19 Malicious also has a particular meaning:

20 "Malicious injury": A "malicious injury" under § 523(a)(6)
21 involves: [1] a wrongful act; [2] done intentionally; [3]
22 that necessarily causes injury; and [4] that is committed
23 without just cause or excuse. [*In re Jercich*, *supra*, 238
24 F3d at 1209; *In re Thiara* (9th Cir. BAP 2002) 285 BR 420,
25 427; *In re Qari* (BC ND CA 2006) 357 BR 793, 798].

26 *Id.* at § 22:680.

27 Assuming the facts most favorable to the plaintiffs, i.e., that
28 the award of statutory penalties required a finding of intent, Order ¶
1, ECF No. 177 (judicial notice of contents of the judgment), issue
preclusion does not resolve the plaintiffs' effort to except the debt
from discharge as willful and malicious. 11 U.S.C. 523(a)(6). The
problem is that § 523(a)(6) imposes a higher intent hurdle than the
California Labor Code. The state statutes that create liability for
an employer do not require a finding of intent. See Cal. Labor Code
§§ 1194, 1194.2, 1197(a) (failure to pay minimum wages), 510, 1194
(failure to pay overtime wages), 226.7, 512 (failure to provide meal
periods), 226.7 (failure to provide rest periods), 226, 226.6 (failure

1 to provide itemized wage statements), 201-203 (failure to pay all
2 wages on discharge).

3 Some of California's statutory penalties arising from the failure
4 to pay overtime and/or rest periods do require a showing of intent and
5 the District Court did impose penalties under those provisions. Cal.
6 Labor Code § 1197.1 (intentionally), § 210 (subsequent violation or
7 willful or intentional violations), § 558 (no intent) § 226.3 (no
8 intent). But the level of intent required for the imposition of
9 statutory penalties is less than those described in § 523(a)(6). Of
10 those provisions, Labor Code § 210 offers the strongest support for a
11 finding of willfulness by the defendants.

12 (a) In addition to, and entirely independent and apart
13 from, any other penalty provided in this article, every
14 person who fails to pay the wages of each employee as
provided in Sections 201.3, 204, 204b, 204.1, 204.2,
204.11, 205, 205.5, and 1197.5, shall be subject to a
penalty as follows:

16 (1) For any initial violation, one hundred dollars (\$100)
for each failure to pay each employee.

17 (2) *For each subsequent violation, or any willful or*
18 *intentional violation, two hundred dollars (\$200) for each*
failure to pay each employee, plus 25 percent of the amount
unlawfully withheld.

20 Cal. Labor Code § 210 (emphasis added).

21 But the word "willful," as used in the Labor Code, means
22 "knowing."

23 The term "wilful", as it is used in section 203 of the
24 Labor Code, does not mean that the refusal to pay wages
must necessarily be based on a deliberate evil purpose to
defraud workmen of wages which the employer knows to be
due, in order to subject him to the penalty. In the case of
25 *May v. New York Motion Picture Corp.*, 45 Cal. App. 396, 404
[187 Pac. 785], it was held that the term "wilful" in its
ordinary use, merely means that one intentionally fails or
refuses to perform an act which is required to be done. It
is said in that regard:

1 "In civil cases the word '*wilful*' as ordinarily used in
2 courts of law, does not necessarily imply anything
3 blameable, or any malice or wrong toward the other party,
4 or perverseness or moral delinquency, but merely that the
5 thing done or omitted to be done, was done or omitted
6 intentionally. It amounts to nothing more than this: That
7 the person knows what he is doing, intends to do what he is
8 doing, and is a free agent." (Citing cases.)
9

6 *Davis v. Morris*, 37 Cal. App. 2d 269, 274-75 (1940) (emphasis
7 added).
8

9 That said, the District Court's intent findings under the
10 California Labor Code do not clear the intent hedgerows of §
11 523(a)(6). *In re Su*, 290 F.3d 1140, 1145 n. 3 (9th Cir. 2002). For
12 that reason, issue preclusion does not apply to the element of a §
13 523(a)(6) (willful and malicious injury) action.

14 **C. Section 523(a)(7)**

15 A discharge under section 727, 1141, 11921 1228(a),
16 1228(b), or 1328(b) of this title does not discharge an
17 individual debtor from any debt--
18

19 ...

20 (7) to the extent such debt is for a fine, penalty, or
21 forfeiture payable to and for the benefit of a governmental
22 unit, and is not compensation for actual pecuniary loss,
23 other than a tax penalty--

24 (A) relating to a tax of a kind not specified in
25 paragraph (1) of this subsection; or

26 (B) imposed with respect to a transaction or event that
27 occurred before three years before the date of the
28 filing of the petition.

11 U.S.C. § 523(a)(7) (emphasis added).

Section 523(a)(7) has three elements: "[t]he debt must (1) be a fine, penalty, or forfeiture; (2) be payable to and for the benefit of a governmental unit; and (3) not constitute compensation for actual pecuniary costs. 11 U.S.C. § 523(a)(7)." *In re Albert-Sheridan*, 960 F.3d 1188, 1193 (9th Cir. 2020).

1 "Governmental unit" is a defined term.

2 The term "governmental unit" means United States; State;
3 Commonwealth; District; Territory; municipality; foreign
4 state; department, agency, or instrumentality of the United
5 States (but not a United States trustee while serving as a
trustee in a case under this title), a State, a
Commonwealth, a District, a Territory, a municipality, or a
foreign state; or other foreign or domestic government.

6 11 U.S.C. § 101(27).

7 **1. Is a civil penalty awarded to Private Attorney General
8 Act plaintiffs, but for which the State of California
9 is the real party in interest, excepted from discharge
under 11 U.S.C. § 523(a)(7)?**

10 The sole issue is whether a judgment for civil penalties,
11 rendered in favor of Private Attorney General Act plaintiffs, Cal.
12 Labor Code §§ 2698 et seq., is a debt "payable to" a "governmental
13 entity." 11 U.S.C. § 523(a)(7).³ This question has not been resolved
14 by the circuit. Cf. *In re Schimmels*, 127 F.3d 875, 880-882 (9th Cir.
15 1997) (assuming debts under the False Claims Act claim fell within §
16 523(a)(7)).

17 The phrase "payable to" is ambiguous as to whether the remittance
18 must be immediate, i.e., paid directly to the governmental entity, or
19 may be distant, i.e., paid to a third party who--as the Cabardo
20 plaintiffs put it--"split" the proceedings with the government entity,
Pls.' Opp'n 7:20, 8:11, ECF No. 213.⁴ The problem is made worse by the

22

³ All other elements of a § 523(a)(7) are established by taking judicia notice
23 of the judgment and its contents. Order ¶ 1, ECF NO. 177 (taking judicial
notice of the judgment in *Cabardo v. Patacsil*, No. 2:212-cv-01705 (E.D. Cal.
2012)). Private Attorney General Act, Cal. Labor Code § 2698 et seq., are
penalties and not compensation for actual loss. *Medina v. Vander Poel*, 523
B.R. 820, 825-826 (E.D. Cal. 2015); see also *Viking River Cruises, Inc. v.
Moriama*, 213 L. Ed. 2d 179, 142 S. Ct. 1906, 1915, reh'g denied, 213 L. Ed.
2d 1145, 143 S. Ct. 60 (2022). Moreover, there is no dispute that State of
California Labor and Workforce Development Agency is a governmental unit, 11
U.S.C. § 101(27), and will receive and benefit from 75% of the civil penalty
awarded. *Vander Poel*, 523 B.R. at 826; Cal. Labor Code § 2699(i).

24 ⁴ Though tempting, the passive voice analysis (which signifies that the actor
25 is unimportant or unknown), applied by the Supreme Court in
26
27
28

unique configuration of Private Attorney General Act cases among qui tam actions. *Magadia v. Wal-Mart Associates, Inc.*, 999 F.3d 668, 677 (9th Cir. 2021) (construing PAGA claims in conjunction with Art. III standing). State and federal courts perceive the relationship between the State of California and Cabardo plaintiffs differently. The State of California perceives the Cabardo plaintiffs its “agent” or “proxy.” *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal.4th 348, 382 (2014); *Amalgamated Transit Union, Loc. 1756, AFL-CIO v. Superior Ct.*, 46 Cal. 4th 993, 1003 (2009). In its view, the State of California is always the real party in interest. *Iskanian*, 59 Cal.4th at 382; *Viking River Cruises Inv.*, 142 S.Ct. at 1914. Federal courts have characterized Private Attorney General Act plaintiffs as full assignees. *Magadia v. Wal-Mart Associates, Inc.*, 999 F.3d 668, 677 (9th Cir. 2021); *Porter v. Nabors Drilling USA, L.P.*, 854 F.3d 1057, 1060 (9th Cir. 2017) (noting that state’s lack of any control over the proceedings); *Viking River Cruises, Inv. V. Moriana*, 142 S.Ct. 1906, 1914 n. 2 (2022) (“[t]he extent to which PAGA plaintiffs truly act as agents of the State rather than complete assignees is disputed”).

Mercifully, this court need not resolve the dispute over characterization of the relationship of the Private Attorney General Act plaintiffs and the State of California. That is so because in other contexts, circuit precedent has consistently applied the

Bartenwerfer v. Buckley, 214 L. Ed. 2d 434, 143 S. Ct. 665, 670 (2023), to 11 U.S.C. § 523(a)(2)(A), is a red herring with respect to § 523(a)(7). Section 523(a)(7) is not phrased in the passive voice. The “unfailing test” for passive voice is “a be-verb plus a past participle (usually a verb ending in -ed).” B. Garner, *Modern English Usage* 483 (1998). Here, the past participle is missing. “Payable” is an adjective. *Encyclopedic Unabridged Dictionary of the English Language* p. 1424 (1996). “Pay” is an irregular verb; the past participle of “pay” is “paid,” not “payable.” *Modern English Usage* 385-386.

1 "payable to" test to the end recipient of the funds sought to be
2 excepted from discharge. See *Albert-Sheridan v. The State Bar of*
3 *California (In re Albert-Sheridan)*, 960 F.3d 1188 (2020); *Scheer v.*
4 *The State Bar of California (In re Scheer)*, 819 F.3d 1206, 1208-1209,
5 1211 (9th Cir. 2016); *Matter of Towers*, 162 F.3d 952, 955 7th Cir.
6 1998) (\$210,000 restitution for civil fraud paid to the Attorney
7 General of Illinois, who disbursed to victims, was not payable to a
8 governmental unit); *In re Sandoval*, 541 F.3d 997 (2008) (guarantor's
9 debt to reimburse bail bondsman for bond forfeiture to the State of
10 Oklahoma not payable to a governmental unit).

11 In *Scheer*, an attorney represented a client in conjunction with a
12 modification of a mortgage loan. The client paid the attorney \$5,500.
13 Later, the client fired the attorney and, by way of California's
14 mandatory fee arbitration program, the client sought the refund of the
15 \$5,500 paid. The arbitrator determined that the attorney violated
16 California Civil Code § 2944.7(a) by receiving advanced fees for
17 residential mortgage modification services and ordered the attorney to
18 refund the entire \$5,500 and also ordered the attorney to pay the
19 client the \$275 arbitration fee. Those amounts totaled \$5,775. When
20 the attorney failed to pay the client the \$5,775, the State Bar
21 suspended the attorney's right to practice law until she paid her
22 former client all funds due and moved successfully for reinstatement
23 to the bar. The attorney filed Chapter 7 bankruptcy, properly
24 scheduling both the former client and the State Bar as creditors. The
25 attorney received her discharge and then demanded reinstatement of her
26 license under 11 U.S.C. § 525 (which prohibits any governmental entity
27 from revoking or refusing to renew a license solely on the basis that
28 the debtor has not repaid a discharged debt). After the State Bar

1 refused to reinstate her license to practice law, the attorney filed
2 an adversary proceeding in the bankruptcy court against the State Bar
3 and its officials contending that the State Bar had violated 11 U.S.C.
4 § 525(a) and 362. The bankruptcy court and the district each rejected
5 her contention finding that the debt was excepted by § 523(a)(7). The
6 circuit found that the debt to a former client did not fall within §
7 523(a)(7) and reversed and remanded the case. The circuit described
8 the arbitration award as "a debt between two private parties, payable
9 to one of them." p. 1209. Notwithstanding The State Bar of
10 California's right to regulate practicing attorneys, the circuit
11 declined to cloak the funds due the client with the protection due
12 governmental units.

13 *Albert-Sheridan* makes the point clearer still. There, an
14 attorney, who specialized in representing consumers represented
15 residential tenants against their landlord. The landlord filed an
16 unlawful detainer action against the tenants. After one of the
17 tenants did not respond to discovery, the landlord filed three motions
18 to compel, which included a request for monetary sanctions (attorneys'
19 fees and costs) against the tenant and counsel. Eventually, the state
20 court ordered discovery sanctions in favor of landlord and against
21 client and the attorney, jointly and severally, in the amount of
22 \$5,738. When the attorney did not pay those discovery sanctions, the
23 State Bar opened an investigation against her. Ultimately, the State
24 Bar suspended the attorney's license and imposed \$18,714 in
25 disciplinary costs. As a condition of reinstatement of her license
26 The State Bar of California required the attorney to pay: (1) the
27 \$18,714 disciplinary costs to it; and (2) to provide proof of payment
28 of the \$5,738 plus 10% interest to the landlord. The attorney filed a

1 Chapter 13 case, which was quickly converted to a Chapter 7 case; the
2 attorney received her discharge, 11 U.S.C. § 727. The attorney then
3 filed an adversary proceeding against The State Bar of California and
4 its employees, arguing § 523(a)(7), 525(a) (antidiscrimination) and
5 other violations. The bankruptcy court held that both the
6 disciplinary costs and the discovery sanctions were discharged based
7 on *In re Findley*, 593 F.3d 1048 (9th Cir. 2010). The bankruptcy court
8 also dismissed the § 525(a) claim "because the State Bar could
9 predicate [the attorney's] reinstatement on the payment of non-
10 dischargeable debts." p. 1192. The attorney appealed to the
11 Bankruptcy Appellate Panel, which affirmed. The attorney then
12 appealed to the Ninth Circuit. There were two issues: (1) discharge
13 of the \$18,714 disciplinary costs due The State Bar of California; and
14 (2) discharge of \$5,738 in discovery sanctions due the landlord in the
15 underlying action ordered by the California Superior Court. As to the
16 \$18,714 disciplinary costs due the State Bar, citing *Findley*, the
17 circuit affirmed, holding that debt nondischargeable. As to the
18 \$5,738 in discovery sanctions due the landlord, the circuit reversed
19 and remanded the case, holding the debt dischargeable. The circuit
20 found that the debt was not payable to the governmental unit and was
21 compensation for actual pecuniary loss.

22 California law authorizes the award of "sanctions" for the
23 "misuse of the discovery process." Cal. Civ. Proc. Code §
24 2023.030(a). A "court may impose a monetary sanction
25 ordering that one engaging in the misuse of the discovery
process, or any attorney advising that conduct, or both pay
the reasonable expenses, including attorney's fees,
incurred by anyone as a result of that conduct."

26 By its terms, the law does not provide for the sanctions to
27 be paid to the court or any other governmental entity, but
28 to "anyone" incurring an expense as a result of discovery
abuse...

1 Here, Albert was ordered to pay the discovery sanctions to
2 "Plaintiff 10675 S. Orange Park Boulevard, LLC." Orange
3 Park Boulevard is not a governmental unit, nor was the
sanction for the benefit of a governmental unit.

4 Accordingly, the discovery sanctions are not payable to or
for the benefit of a governmental unit.

5 *Id.* at 1193 (internal citation omitted).

6 Scheer and *Albert-Sheridan* teach us that in determining whether a
7 civil penalty is "payable to," 11 U.S.C. § 523(a)(7), the analysis is
8 applied to the end recipient of the funds.⁵ Certainly, both *Scheer* and
9 *Albert-Sheridan* apply the end recipient as a rule of exclusion. And
10 the case now before the court applies the end recipient as a rule of
inclusion. But this court believes the principle applies with equal
11 force, without regard to the direction in which it cuts.

12 Applying that analysis here, the majority (75%) of the civil
13 penalties will be paid to the Labor and Workforce Development Agency.
14 Cal. Labor Code § 2699(i). And the District Court judgment so states.
15 As a result, the civil penalties payable to a governmental unit fall
16 within § 523(a)(7), notwithstanding that it was recovered by a qui tam
17 plaintiff.⁶

18

⁵ Concededly, criminal restitution payments are treated differently. *Kelly v. Robinson*, 479 U.S. 365 (1986). But the Ninth Circuit has consistently refused to apply *Kelly* to civil restitution payments. *Albert-Sheridan v. The State Bar of California (In re Albert-Sheridan)*, 960 F.3d 1188 (2020); *Scheer v. The State Bar of California (In re Scheer)*, 819 F.3d 1206, 1208-1209, 1211 (9th Cir. 2016).

19 ⁶ A large body of case law applying § 362(b)(4) (exceptions to the stay)
20 almost always finds that qui tam plaintiffs may not avail themselves of that
provision. *Porter v. Nabors Drilling USA, L.P.*, 854 F.3d. 1057 (9th Cir.
21 2017) (Private Attorney General Act plaintiffs not entitled to assert
exception to stay, 11 U.S.C. § 362(b)(4)); *In re Wade*, 948 F.2d 1122 (9th
22 Cir. 1991) (State Bar of Arizona excepted from stay, 11 U.S.C. § 362(b)(4));
23 *In re Revere Copper and Brass, Inc.*, 32 B.R. 725 (S.D. N.Y. 1983) (private
attorney generals not entitled to avail themselves of §362(b)(4)); *contra*
24 *U.S. ex rel. Doe v. X, Inc.*, 246 B.R. 817, 820 (E.D. Va. 2000). In doing so,
25 those cases rely heavily on the government's lack of involvement in the
prosecution of the qui tam action. *Porter*, 854 F.3d at 1062-1063. This
26 court believes those cases are distinguishable. The focal point of each
statute and the prepositions used, *In re AE Bicycle Liquidation, Inc.*, 612
27 B.R. 330, 336 n. 6 (Bankr. M.D. N.C. 2019) (describing the differences in
28 prepositions used), suggest opposite constructions. Section 523(a)(7) looks

1 **2. How much of the civil penalty awarded to Private
2 Attorney General Act plaintiffs as a part of a
3 prepetition judgment fall non-dischargeable under
3 Section 523(a) (7)?**

4 Having determined that § 523(a)(7) applies to civil penalties
5 awarded Private Attorney General Act plaintiffs, what is the amount of
6 the penalties that may be excepted: the entire amount or only 75%?

7 This court finds that only 75% of the penalties may be excepted.
8 Applying the plain meaning approach, *Ron Pair Enterprises, Inc.*, 489
9 at 241, the court notes that the § 523(a)(7) only excepts "A discharge
10 ...does not discharge an individual debtor from any debt--.....
11 to the extent such debt is for a fine, penalty, or forfeiture payable
12 to and for the benefit of a governmental unit..." 11 U.S.C. §
13 523(a)(7) (emphasis added). Only 75% of that amount will inure to the
14 benefit of the State of California. Cal. Labor Code 2699(i).

15 Few, if any, cases directly have considered the amount of a civil
16 penalty that may be excepted from discharge under § 523(a)(7) when a
17 qui tam relator and a governmental unit split the amount awarded. But
18 long-standing case law in other contexts restricts the fines,
19 penalties and forfeitures excepted from discharge to the amount that
20 the governmental unit retains. *Matter of Towers*, 162 F.3d 952, 955-
21 956 (7th Cir. 1998) (\$50,000 penalty due the state excepted from
22 discharge, but \$210,000 restitution paid to the State of Illinois for
23 disbursement to victims was discharged); *In re Stevens*, 184 B.R. 584
24 (Bankr. W.D. Wash. 1995) (county to receive "100% of sums the
25 defendant collects"); *In re Sanders*, 589 B.R. 874, 880 n. 4 (Bankr.

26 to the character of the debt, not to the actor. Debts must be "payable to
27 and for the benefit of a governmental unit." Just to the opposite is the
28 thrust of § 362(b), which focuses on the actor, and not on the debt. That
statute excepts from the stay, "the commencement or continuation of an action
or proceeding by a governmental unit" in the exercise of its police powers.

1 W.D. Wash. 2018) (same); *In re Dickerson*, 510 B.R. 289, (Bankr. D.
2 Idaho 2014) (collection costs due the third-party collectors); *Kish v.*
3 *Farmer (In re Kish)*, 238 B.R. 271, 286 (Bankr. D.N.J. 1999)
4 (surcharges arising from vehicle fines not "for the benefit of the
5 government").⁷

6 Applying the principles of claim preclusion to the judgment, the
7 amount of the civil penalties that may be excepted under § 523(a)(7)
8 is only the amount due the California Labor and Workforce Development
9 Agency; that amount is \$59,643.⁸ Cal. Labor Code § 2699(i).

10 **3. Are attorneys' fees awarded to successful Private
11 Attorney General Act plaintiffs as a part of a
12 prepetition judgment made non-dischargeable by Section
13 523(a)(7)?**

14 The Cabardo plaintiffs contend that issue preclusion applies to
15 except the attorneys' fees, \$1,077,218, awarded to them from discharge
16 under § 523(a)(7). Joint Mot. to Determine Facts 5:23-24, ECF No.
17 117; Joint Resp. Req. Further Br. 21:18-25:13, ECF No. 188. The
18 plaintiffs advance two arguments: (1) that the attorneys' fees are
19 ancillary to the judgement, and flow from it; and (2) they are penal
in nature and, therefore, may be paid to a private party. *Id.*

20 This court disagrees. It is beyond question that a prevailing
21 party under most—perhaps all, provisions of § 523(a), may recover
22 attorneys' fees as a component of damages, provided they could recover
23 them outside bankruptcy. *Cohen v. de la Cruz*, 523 U.S. 213 (1998) (11
24 U.S.C. § 523(a)(2)(A)); *In re Zito*, 604 B.R. 388 (9th Cir BAP 2019) 11
25

26 ⁷ Any argument that *Kelly v. Robinson*, 479 U.S. 36 (1986) (excepting criminal
27 restitution under § 523(a)(7)) also excepts civil penalties as restitution is
foreclosed by *In re Scheer*, 819 F.3d 1206, 1209 (9th Cir. 2016); *In re Albert-Sheridan*, 960 F.3d 1188, 1194-1195 (9th Cir. 2020); *In re Parsons*, 505
28 B.R. 540, 544-545 (Bankr. D. Haw. 2014).

⁸ That amount is \$79,524 multiplied by 75%. Cal. Labor Code § 2699 (i).

1 U.S.C. § 523(a)(3)). Ordinarily, there are two prerequisites: "(1) an
2 underlying contract or nonbankruptcy law must provide a right to
3 recover attorneys' fees, and (2) the issues litigated in the
4 dischargeability action must fall within the scope of the contractual
5 or statutory attorneys' fees provision." *In re Saccheri*, No. ADV 09-
6 1273, 2012 WL 5359512, at *13 (B.A.P. 9th Cir. Nov. 1, 2012), aff'd,
7 599 F. App'x 687 (9th Cir. 2015).

8 Admittedly, a qui tam plaintiff's right to except attorneys' fees
9 for pursuing civil penalties payable to the sovereign from discharge
10 under § 523(a)(7) has not been well litigated. But this court does
11 not believe that *Cohen* overrides specific and clear requirements of §
12 523(a)(7), which limits the species of damages (including attorneys'
13 fees) that are excepted from discharge and the recipient of those
14 funds. Compare *Cohen*, 523 U.S. at 222 (referring to § 523(a)(7)) with
15 *Hughes v. Sanders*, 469 F.3d 475, 477-479 (6th Cir. 2006) (omitting
16 reference to *Cohen* and finding attorneys' fees to be discharged
17 notwithstanding § 523(a)(7)) with *Searcy v. Ada County Prosecuting*
18 *Attorney's Office (In re Searcy)*, 463 B.R. 888 (2012) (excepting costs
19 and attorney's fees due county for inmate's unsuccessful action
20 against it under § 523(a)(7)). As the Supreme Court said in *Cohen*:

21 *If, as petitioner contends, Congress wished to limit the*
22 *exception to that portion of the debtor's liability*
23 *representing a restitutionary—as opposed to a compensatory*
24 *or punitive—recovery for fraud, one would expect Congress*
25 *to have made unmistakably clear its intent to distinguish*
26 *among theories of recovery in this manner. See, e.g., §*
27 *523(a)(7) (barring discharge of debts "for a fine, penalty,*
28 *or forfeiture payable to ... a governmental unit," but only*
29 *if the debt "is not compensation for actual pecuniary*
30 *loss").*

31 *Id.* at 222 (emphasis added).

32 This court believes that congress has done just that, i.e.,

1 limited the recovery that may be had, in § 523(a)(7). The Cabardo
2 plaintiffs face two hurdles. Both are insurmountable. At the outset,
3 the attorney's fees were awarded to private parties, or their counsel,
4 and not a governmental unit. Courts that have faced the question of
5 whether an individual, rather than the government, may except
6 attorneys' fees from discharge under § 523(a)(7) have declined to do
7 so. *In re Albert-Sheridan*, 960 F.3d 1188, 1193-1196 (9th Cir. 2020)
8 (attorneys' fees and costs awarded as discovery sanctions due in
9 underlying litigation); *Hughes v. Sanders*, 469 F.3d 475, 477-479 (6th
10 Cir. 2006) (attorneys' fees and costs payable to former client were
11 not payable to and for the benefit of the government and was
12 compensation for actual pecuniary loss); *In re Carpenter*, 2011 WL
13 841473 *2-3 (Bankr. D.C. March 8, 2011) (judgment for oral
14 construction project including \$3,000 attorneys' fees); *In re Luca*,
15 422 B.R. 772, 777-778 (Bankr. M.D. Fl. 2010); *In re Stutz*, 154 B.R.
16 508 (Bankr. N.D. Ind. 1993) (pre-Cohen).

17 In *Hughes* the Sixth Circuit Court of Appeals considered a legal
18 malpractice case. There, an attorney, Sanders, sued Ford Motor
19 Company on behalf of a client, Hughes, in connection with an
20 employment problem. After Hughes lost, he sued Sanders for
21 malpractice in District Court. During the malpractice action, Sanders
22 violated court orders (including discovery orders) and orders to
23 appear. Eventually, the District Court struck Sanders' answer and
24 took his default. The District Court scheduled a hearing on damages
25 at which Sanders failed to appear. The District Court awarded Hughes:
26 \$894,316 as damages (lost wages and interest in the underlying case);
27 \$143,602 in attorney's fees and costs in the underlying case; and
28 \$25,873 for attorneys' fees and costs in the malpractice case.

1 Sanders filed a Chapter 7 case and Hughes brought an action to except
2 the debt from discharge under § 523(a)(7). Sanders filed a motion to
3 dismiss under Federal Rule of Civil Procedure 12(b)(6) and the
4 District Court "reluctantly granted the motion." The Sixth Circuit
5 affirmed. In doing so, the court found that the judgment was payable
6 to Hughes, who is not a governmental unit and that it was calculated
7 to compensate Hughes for the damages incurred. The Sixth Circuit
8 stated:

9 *Under the plain language of 11 U.S.C. § 523(a)(7), Hughes
10 cannot prevail unless he can show both that the penalty
11 owed by Sanders is payable to and for the benefit of a
12 governmental unit. Here, he can show neither. It is
13 undisputed that the penalty is payable to Hughes. And it is
14 undisputed that the judgment is for an amount calculated to
15 compensate Hughes for damages, attorney's fees and costs
16 claimed in and arising out of the malpractice action. He
17 therefore has not stated and cannot state a claim for which
18 relief can be granted.*

19 We note that even if we were to accept Hughes's contention
20 that the judgment is payable "to and for the benefit of a
21 governmental unit," Hughes cannot prevail. *The final
22 requirement under 11 U.S.C. § 523(a)(7) for excepting a
23 debt from discharge is that the debt is "not compensation
24 for actual pecuniary loss."* In this case, the debt owed by
25 Sanders was a default judgment in an amount explicitly
26 calculated to compensate Hughes for malpractice damages,
27 litigation costs and attorney's fees. That the judgment is
28 a default judgment entered by the district court in part as
a sanction for Sanders's inexcusable and unprofessional
conduct does not change the judgment's compensatory
character.

29 *Id.* at 479 (emphasis added).

30 Here, the attorneys' fees are due the Cabardo plaintiffs, or
31 their counsel, but not the government.

32 [A]n aggrieved employee may recover the civil penalty
33 described in subdivision (f) in a civil action pursuant to
34 the procedures specified in Section 2699.3 filed on behalf
35 of himself or herself and other current or former employees
36 against whom one or more of the alleged violations was
37 committed. Any employee who prevails in any action shall be
38 entitled to an award of reasonable attorney's fees and
39 costs...

1 Cal. Labor Code § 2699(g)(1) (emphasis added).

2 But there is more. In order to qualify for exception to
3 discharge (including attorneys' fees) under § 523(a)(7) the debt must
4 not be compensatory. *Hughes v. Sanders*, 469 F.3d 475, 477-479 (6th
5 Cir. 2006); *In re Parsons*, 505 B.R. 540 (Bankr. D. Haw. 2014)
6 (attorneys' fees due the Hawaii Office of Consumer Protection was a
7 pecuniary loss because "the time expended by OCP's counsel could have
8 been devoted to other cases"). As the *Hughes* court phrased it:

9 The final requirement under 11 U.S.C. § 523(a)(7) for
10 excepting a debt from discharge is that the debt is "not
11 compensation for actual pecuniary loss." In this case, the
12 debt owed by Sanders was a default judgment in an amount
13 explicitly calculated to compensate Hughes for malpractice
14 damages, litigation costs and attorney's fees.

15 *Hughes*, 469 F.3d at 475.

16 Here, the District Court's award of attorneys' fee was based on
17 the lodestar method and was designed to compensate the Cabardo
18 plaintiffs and their counsel for the time and effort expended in
19 prosecuting the underlying District Court action. Attorneys' fees may
20 not be excepted under 523(a)(7).

21 VI. Conclusion

22 For each of these reasons, the motions will be granted in part
23 and denied in part. As to the existence and amount of "debt" owed by
24 the defendants to the plaintiffs, 11 U.S.C. §§ 523(a), 101(5), (12),
25 issue preclusion applies and bars the defendants from re-litigating
26 the existence of a debt from the defendants to the plaintiffs or the
27 amount of that debt.

28 As to § 523(a)(6), there is not issue identity with respect to
29 the intent element, i.e., willful and malicious, and issue preclusion
30 is not applicable. As a result, the remaining issue (intent) must be

1 resolved by trial.

2 As to § 523(a)(7), issue identity exists as to the civil penalty.

3 As to the 75% due the State of California, Cal. Labor Code § 2699

4 (g)(1), issue preclusion applies and bars relitigating that issue.

5 And that amount will be excepted from discharge, but only as to the

6 State of California. As to the remaining 25% of the civil penalty due

7 the plaintiffs and as to the attorneys' fee awarded, § 523(a)(7) does

8 not except those amounts from discharge.

9 The court will issue an order from chambers.

10 **Dated:** June 09, 2023



11
12 **Fredrick E. Clement**
13 **United States Bankruptcy Judge**

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Instructions to Clerk of Court

Service List - Not Part of Order/Judgment

The Clerk of Court is instructed to send the Order/Judgment or other court generated document transmitted herewith *to the parties below*. The Clerk of Court will send the document via the BNC or, if checked , via the U.S. mail.

Attorneys for the Plaintiff(s)	Attorneys for the Defendant(s)
Bankruptcy Trustee (if appointed in the case)	Office of the U.S. Trustee Robert T. Matsui United States Courthouse 501 I Street, Room 7-500 Sacramento, CA 95814